

HOUSE BILL 2157

By Ragan

AN ACT to amend Tennessee Code Annotated, Title 49,
relative to due process for students of higher
education institutions.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 49, Chapter 7, is amended by adding sections 2 through 10 of this act as a new part:

SECTION 2. The requirements of this part apply to each public higher education institution located in this state.

SECTION 3. As used in this part, unless the context otherwise requires:

(1) "Adjudicator" means an individual employed by, or under contract with, a public higher education institution to preside at institutional disciplinary proceedings, who has no conflicts of interest and is:

(A) Listed as an active Rule 31 mediator by the alternative dispute commission established by the supreme court;

(B) An active or retired Tennessee administrative law judge in good standing; or

(C) A former or retired chancellor or circuit or criminal court judge who is eligible to serve as a special judge by designation of the chief justice of the supreme court;

(2) "Advocate", with respect to institutional disciplinary proceedings, means:

(A) An attorney who is admitted to practice in this state, freely chosen by the alleged perpetrator or alleged victim at such person's own expense who is authorized to advise and speak on behalf of that individual; or

(B) An individual other than an attorney freely chosen by the alleged perpetrator or alleged victim who is authorized to advise and speak on behalf of that individual;

(3) "Covered allegation", with respect to a public higher education institution, means any allegation that:

(A) A student of the institution committed an act of sexual violence;

(B) Members of a student organization committed an act of sexual violence;

(C) The institution created a hostile environment as a result of sexual violence; or

(D) A student of the institution committed an act wherein the facts alleged to have occurred are sufficient to support the filing of criminal charges for a felony or misdemeanor offense, under the laws of this state, federal law, or the Uniform Code of Military Justice, codified in 10 U.S.C. §§ 850a, 876b;

(4) "Conflict of interest", with respect to a public higher education institution, means a situation wherein:

(A) The adjudicator or investigator has prior, direct, personal knowledge or involvement in the alleged activities;

(B) The adjudicator or investigator has prior, non-casual, personal or professional relationships with the alleged perpetrator, the alleged victim, a witness, or an official conducting or participating in conferences, hearings, or meetings concerning or connected with the alleged activities;

(C) Any of the duties of investigator, adjudicator, or advocate for the same case are being performed by the same person; or

(D) An investigator, adjudicator, or advocate has administrative duties at the institution;

(5) "Hostile environment" means harassment against a member of a protected class, on the basis of sex, that is so severe, pervasive, and objectively offensive that it could be said to deprive the student of access to the educational opportunities or benefits provided by the institution;

(6) "Institutional disciplinary proceeding" means the process by which a public higher education institution investigates and adjudicates a covered allegation and imposes a sanction with respect to the allegation, in accordance with the institution's own code of conduct or similar internal rules;

(7) "Investigator" means an individual who does not have a conflict of interest and who is employed by, or under contract to, a public higher education institution to legally gather facts and evidence, take testimony under prescribed guidelines, and present reports to adjudicators, and who is:

(A) An attorney licensed to practice law in this state;

(B) A commissioned, POST-certified law enforcement officer, either active or retired in good standing, with formal forensics training and experience;

(C) Licensed as a private investigator under title 62, chapter 26; or

(D) Formally trained and experienced in the field of forensics through employment as an insurance claims investigator or military police officer;

(8) "Local law enforcement agency" means the municipal or county law enforcement agency with jurisdiction to respond to a covered allegation in the geographic territory where the public higher education institution that is referring the covered allegation is located; and

(9) "Sexual violence", with respect to a public higher education institution, means:

(A) Sexual abuse, as defined in 18 U.S.C. § 2242;

- (B) Aggravated sexual abuse, as defined in 18 U.S.C. § 2241;
- (C) Sexual battery, as defined in § 39-13-505;
- (D) Aggravated sexual battery, as defined in § 39-13-504;
- (E) Rape, as defined in § 39-13-503; or
- (F) Aggravated rape, as defined in § 39-13-502.

SECTION 4. Each public higher education institution in this state shall provide:

(1) Education programs designed to address sexual violence that, at a minimum, provide training for reporting covered allegations and fostering the development of legally appropriate relationships. Each institution shall provide access to the sexual violence programs for each student during each academic year and ensure that new students are made aware of the programs and can access the programs as soon as possible after beginning a course of study at the institution;

(2) Resources for students affected by sexual violence. The resources, at a minimum, shall include access to counseling services and information regarding resources available on campus and in the surrounding community for students affected by sexual violence. Alleged victims shall be provided information about the resources immediately after reporting an allegation of sexual violence to the institution, and the alleged perpetrator shall be provided information about available resources in the notice of the accusations; and

(3) Appropriate annual training to campus security personnel, campus disciplinary committee members, and other institutional personnel who have employment-related responsibilities to which such training is relevant, as determined by the institution, regarding the requirements of this part.

SECTION 5.

(a) Subject to the requirements of subsections (b) and (c), each time that a covered allegation is reported to a public higher education institution, the institution shall refer the covered allegation to the appropriate local law enforcement agency for investigation.

(b) A public higher education institution that receives a complaint of a covered allegation shall seek permission to proceed from the alleged victim. Prior to requesting an alleged victim's permission to proceed with the disposition of a complaint of a covered allegation, an institution of higher education shall inform the alleged victim that providing permission to proceed authorizes the institution to refer the covered allegation to the local law enforcement agency. The institution shall inform the alleged victim of non-punitive support services and non-punitive accommodations that are available to the alleged victim regardless of whether the alleged victim provides the permission to proceed, but that the institution shall not take disciplinary action against the alleged perpetrator unless the covered allegation is investigated by the local law enforcement agency.

(c)

(1) Except as provided in subdivision (c)(2), a public higher education institution shall not refer a covered allegation to the local law enforcement agency, if the alleged victim informs the institution that the individual does not want the allegation to be investigated by a law enforcement agency. If an alleged victim instructs the institution to refrain from reporting a covered allegation to the local law enforcement agency, the institution shall not initiate or otherwise carry out any institutional disciplinary proceeding against the alleged perpetrator with respect to the allegation, including imposing punitive interim measures described in Section 6 of this act. Nothing in this subsection (c) shall

prohibit an institution from providing an alleged victim with academic accommodations, housing accommodations, or support services.

(2)

(A) When an alleged victim of an act of sexual violence included in the covered allegation requests that a public higher education institution not refer a covered allegation to the local law enforcement agency, the institution shall determine whether or not the institution can honor the request while still providing a non-hostile environment for all students, including the student who reported the covered allegation.

(B) When an institution is determining whether the institution can honor an alleged victim's request to withhold a covered allegation involving an act of sexual violence from the local law enforcement agency, the institution shall consider a range of factors, including, but not limited to, the following:

(i) Whether there is an objective basis to believe that there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence;

(ii) Whether the alleged perpetrator has a history of arrests or records from the current or a prior institution of higher education indicating a history of violence;

(iii) Whether the alleged perpetrator is alleged to have threatened further sexual violence or other violence against the alleged victim or others;

(iv) Whether there is an objective basis to believe that the sexual violence was committed by multiple perpetrators;

(v) Whether there is an objective basis to believe that there is an increased risk of future acts of sexual violence under similar circumstances;

(vi) Whether the sexual violence was perpetrated with a weapon; and

(vii) The age of the alleged victim subjected to the sexual violence.

(C) When an institution determines that the institution must report a covered allegation against the alleged victim's request, the institution shall notify the alleged victim of the determination and rationale in writing within twenty-four (24) hours of making such determination.

SECTION 6.

(a) For purposes of this section, the time period in which a local law enforcement agency is investigating a complaint of a covered allegation reported under Section 5 of this act is the thirty-day period immediately following the date that the public higher education institution referred the covered allegation to the local law enforcement agency and any immediately subsequent thirty-day period for which the local law enforcement agency notifies the institution that the institution is continuing to investigate the covered allegation and that the public interest is best served by preventing the institution from beginning its own investigation and disciplinary proceeding.

(b) During the period in which a local law enforcement agency is investigating a covered allegation reported by a public higher education institution under Section 5 of this act, the institution shall not initiate or otherwise carry out any institutional disciplinary proceeding with respect to the covered allegation, except to the extent that the institution may impose interim sanctions under subsection (e).

(c) For purposes of satisfying any federally prescribed time period for a higher education institution to complete an adjudication of a covered allegation, the time period shall begin upon the expiration of the period in which the local law enforcement agency is investigating the allegation.

(d) If a public higher education institution operates an accredited public safety department that employs commissioned law enforcement officers, then that department may carry out investigative functions with respect to a covered allegation referred to a local law enforcement agency under Section 5 of this act, if authorized to do so by the local law enforcement agency.

(e)

(1) During the period in which a local law enforcement agency is investigating a covered allegation, the institution may impose interim sanctions against the alleged perpetrator of the covered allegation with respect to the covered allegation and carry out investigations and adjudications with respect to the imposition of interim sanctions, but only if the institution determines that the imposition of such a sanction is necessary to eliminate a hostile environment.

(2) Interim sanctions may include temporary suspensions, no-contact orders, adjustments of class schedules, or changes in housing assignments.

(3) Periods of temporary suspensions are subject to the following restrictions:

(A) Subject to subdivision (e)(3)(C), if the subject of a covered allegation is a student, a public higher education institution may impose a temporary suspension for a period of not more than fifteen (15) days, and may extend the temporary suspension for additional periods of not more than thirty (30) days per period if, pursuant to a hearing held in

accordance with the requirements of Section 8 of this act for each additional period of temporary suspension, the institution finds that an extension is necessary because the student poses an immediate threat to campus safety;

(B) If the subject of a covered allegation is a student organization, a public higher education institution may impose a temporary suspension for a period of not more than fifteen (15) days on the operations of the organization, but only if the institution determines that the organization has engaged in activity that, if ongoing, poses an immediate threat to campus safety, and that the imposition of the suspension is not done merely for punitive purposes. Interim suspensions and sanctions on student organizations may be extended for additional periods of not more than thirty (30) days per period if, pursuant to a hearing held in accordance with the requirements of Section 8 of this act for each additional period of temporary suspension, the institution finds that extension is necessary because the student organization's activities pose an immediate threat to campus safety; and

(C) An interim sanction imposed under this subsection (e) with respect to a covered allegation shall terminate no later than the expiration of the period in which a local law enforcement agency is investigating the covered allegation, unless an indictment has been issued with respect to the covered allegation and the alleged perpetrator is a student, in which case the public higher education institution may continue the sanction, including a temporary suspension the duration of which would otherwise be limited under this subdivision (e)(3), until the latter of the final

resolution of the criminal case or the completion of any sentence imposed.

(f) Once a public higher education institution receives a complaint of a covered allegation, the institution may offer reasonable academic and housing accommodations, as well as other support services, to the alleged victim and the alleged perpetrator that the institution determines to be appropriate.

SECTION 7.

(a) A public higher education institution in this state shall not be subject to civil liability on the grounds that the institution:

(1) Did not investigate or adjudicate a covered allegation, or did not impose any sanction with respect to a covered allegation, to the extent that the institution was prohibited under this part from initiating or carrying out any institutional disciplinary proceeding with respect to the covered allegation; or

(2) Reported a covered allegation to the local law enforcement agency under Section 5(c)(2) of this act.

(b) A public higher education institution in this state shall not impose a sanction on a student who is a victim of, or a bystander witness to, an act of sexual violence on the grounds that the student engaged in conduct prohibited under the institution's code of conduct, other than violent conduct, if the institution learned that the student engaged in the conduct as part of a report of a covered allegation that was made in good faith by the student to an agent of the institution.

(c) Nothing in this section shall limit the authority of any person to seek a civil remedy in a court of competent jurisdiction with respect to any covered allegation, except those claims expressly prohibited under subsection (a).

SECTION 8.

(a) A public higher education institution in this state shall not impose any sanction, other than an interim sanction under Section 6, on any person, including a student organization, in response to a covered allegation unless the sanction is imposed under a formal hearing or similar adjudicatory proceeding, in accordance with institutional disciplinary proceedings that meet each of the following requirements:

(1) The institution shall provide all parties to the proceeding with written notice of the covered allegation not later than two (2) weeks prior to the start of any formal hearing or similar adjudicatory proceeding, and shall include in the written notice a description of all rights and responsibilities under the proceeding, a statement of all relevant details of the covered allegation, and a specific statement of the sanctions that may be imposed;

(2) The institution shall provide each person against whom the covered allegation is made with a meaningful opportunity to admit or contest the allegation;

(3) The institution shall ensure that all parties to the hearing have access to all material evidence, including both inculpatory and exculpatory evidence, not later than one (1) week prior to the start of any formal hearing or similar adjudicatory proceeding. The evidence may include but is not limited to alleged victim statements, third-party witness statements, electronically stored information, written communications, social media posts, and demonstrative evidence;

(4) The institution shall permit the alleged victim and the alleged perpetrator to be represented, at each party's own expense, by an advocate for the duration of the proceeding, including during the investigation of the allegation and other preliminary stages prior to a formal hearing or similar adjudicatory

proceeding, and shall permit the advocate to ask questions in the proceeding, file relevant papers, examine evidence, examine witnesses, and make arguments to the fact-finder. Before the disciplinary proceeding is scheduled and before a student may be questioned by an institution or by an agent of the institution concerning allegations of violations of the institution's disciplinary or conduct rules where the charges are punishable by a suspension of ten (10) or more days or expulsion, the institution shall inform the student in writing of the student's rights under this part. Nothing in this subdivision (a)(4) shall be interpreted as requiring the institution to use the Tennessee Rules of Evidence during a hearing, except as required under subdivisions (a)(5) and (6);

(5) The institution shall permit the alleged victim and the alleged perpetrator to confront witnesses, including the alleged victim; provided, that the questioning is conducted in a non-abusive manner and is limited to topics that are relevant to the hearing. It shall be presumptively improper for any person to make any inquiry about the sexual history of the individual reporting the covered allegation, unless the inquiry is permissible under Rule 412 of the Tennessee Rules of Evidence;

(6) The institution shall inform the alleged victim and the alleged perpetrator of the following:

(A) The right of all parties to avoid self-incrimination;

(B) The right of the alleged victim and the alleged perpetrator to silence and the fact that the institution may not impose any findings of guilt, sanctions, restrictions, or punishment because the student exercises this right;

(C) The right of the alleged perpetrator to an initial and independent presumption of innocence to each allegation;

(D) The right of the alleged victim and the alleged perpetrator to be secure in the student's person, residence, papers, and effects, against unreasonable searches and seizures, except under warrants issued by competent legal authority on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized; and

(7) The institution shall ensure that the proceeding is carried out free from conflicts of interest by ensuring that there is no commingling of administrative or adjudicative roles. For purposes of this subdivision (a)(7), an institution shall be considered to commingle such roles if any individual carries out more than one (1) of the following roles with respect to the proceeding:

(A) Victim counselor and victim advocate;

(B) Investigator;

(C) Alleged perpetrator counselor and alleged victim student advocate;

(D) Adjudicator; or

(E) Appellate adjudicator.

(b) The final determination of an adjudicator concerning a covered allegation may be appealed under § 4-5-322.

(c)

(1) Subject to the limitations against liability in Section 7 of this act, any party who is aggrieved by a decision to impose a sanction under an institutional disciplinary hearing under this section may bring a civil action in the circuit court

of the county where the public higher education institution is located, but only if the action is brought not later than one (1) year after the date on which the individual received final notice of the sanction imposed on the individual under the proceeding.

(2) In any action brought under this subsection (c), the court may find for the plaintiff if the court finds that the imposition of the sanction was arbitrary, capricious, or contrary to law.

(3) Within thirty (30) days of receipt of a complaint filed under this subsection (c), the public higher education institution shall forward the administrative record of the institutional disciplinary hearing to the court.

(4) In any civil action under this subsection (c), the court may award the prevailing party, other than the public higher education institution, compensatory damages, punitive damages, reasonable court costs, attorney fees, including expert fees, and any other relief in equity or law that the court deems appropriate.

(d) Nothing in this section shall be construed to create a right for any individual to be represented by an attorney or other advocate at a public higher education institution's expense.

SECTION 9. The board of regents and the board of trustees of the University of Tennessee shall promulgate rules in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, to effectuate the purposes of this part. The board of regents and the board of trustees of the University of Tennessee shall coordinate all rulemaking required by this section with the Tennessee higher education commission to ensure that the rules are uniform across all public higher education institutions in this state.

SECTION 10. Each public higher education institution in this state shall publish annually in the institution's student handbook, or equivalent publication, a statement of the procedures applicable to institutional disciplinary hearings proceedings under this part.

SECTION 11. Public higher education institutions in this state shall implement this act from existing public resources that are provided to those institutions for funding diversity programs; provided, that such resources are not federally mandated to be expended for another purpose.

SECTION 12. If any provision of this act or its application to any person or circumstance is held invalid, then the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to that end the provisions of this act shall be severable.

SECTION 13. This act shall take effect upon becoming a law for purposes of promulgating rules, the public welfare requiring it. This act shall take effect on July 1, 2016, for all other purposes, the public welfare requiring it.